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IN THE
COURT OF APPEALS OF INDIANA

COREY ROCHELL FITCH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0608-CR-373
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Casey J. McCloskey, Temporary Judge
Cause No. 45G04-0512-FB-104

August 21, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Corey Rochell Fitch appeals his convictions and sentences for three counts of dealing in cocaine, as a Class B felony,[1] and being adjudicated an habitual substance offender.[2] We affirm the convictions of dealing in cocaine, but remand for further proceedings regarding the habitual substance offender allegation and sentencing.

Issues

Fitch raises four issues on appeal, which we restate as follows:

(1) Whether Fitch was deprived of his right to a public trial, where the trial court removed spectators from the courtroom during the testimony of a confidential informant;

(2) Whether the State's repeated references to facts not in evidence constituted fundamental error;

(3) Whether the trial court erred by conducting the habitual substance offender adjudication as a bench trial, where Fitch had not personally waived his right to a jury trial; and

(4) Whether the sentence for being adjudicated an habitual substance offender should be imposed as an enhancement of one of the sentences for dealing in cocaine, rather than as a separate sentence.

Facts and Procedural History

On three different days, Fitch sold cocaine to a confidential informant working with the Lake County Drug Task Force. The transactions occurred at the same residence in Gary. The State charged him with three counts of dealing in cocaine and later sought to have him

[1] Ind. Code § 35-48-4-1(a)(1)(c).

[2] Ind. Code § 35-50-2-10.

adjudicated an habitual substance offender.[3]

During the jury trial, the State called the confidential informant as a witness and asked the trial court to clear the spectators from the courtroom, citing concern for the informant's safety. The trial court granted the State's motion, reasoning "that he be allowed to testify not under the threat of duress or fear." Transcript at 470. The trial court clarified that spectators would be allowed back into the courtroom after the informant testified.[4]

In its closing argument, the State decried repeatedly the societal harm of a "crack house." Id. at 665. The State argued that,

> . . . this is a story about a crack house, and this is a story about the drug dealer who sold poison to people.
>
> I characterize crack cocaine as poison, because it affects not only the people that it is sold to, it brings down neighborhoods. It can lead to violence when people try to rob and steal from people to support their habit, innocent . . . bystanders could get caught in the line of fire between some type of a drug deal gone bad.

Id. The trial court sustained Fitch's objection that the State was reciting facts not in evidence. On rebuttal, a different prosecutor reiterated the same ideas.

> [Defense counsel] is trying to convince you that a crack house, not that big of a deal, it's not that big of a deal. No, it is a big deal, because crack houses as [the other prosecutor] pointed out to you, do you know what they bring to a neighborhood? They bring addicts. And you know what addicts bring? They bring crime, because you know what, when they want their drugs, they will steal, they will rob, they will murder to get their drugs.

[3] The State initially charged Fitch with an additional count of dealing in cocaine, pursuant to I.C. § 35-48-4-1(a)(2)(c). In its Second Amended Information, however, the State omitted this charge.

[4] The Record reflects that the courtroom was cleared prior to the informant's testimony. No statement was made on the Record, however, confirming that the public was allowed to re-enter prior to the testimony of the next witness.

Id. at 695. Fitch again objected. The State argued that Fitch had opened the door, but the trial court indicated that he had not, simply instructing the State to "[m]ove on." Id. Finally, regarding the confidential informant, the State argued,

> Then we walk up to a really dangerous crack house. We're going to go inside. The security that we have is outside in that police car, because if they find out that he's a confidential informant, I'm going to tell you, he won't be alive.

Id. at 703. Fitch objected that the State's assertions had "nothing to do with what did or did not occur on the specific three dates that the State has charged my client with a crime." Id. This time, the trial court implicitly overruled Fitch's objection, noting that "[i]t's closing argument." Id. Fitch did not request an admonishment or mistrial.

The jury found Fitch guilty of three counts of dealing in cocaine and the trial court found him to be an habitual substance offender. The trial court sentenced Fitch to concurrent, eighteen-year terms of imprisonment for the three convictions, and imposed a separate, consecutive sentence of six years for Fitch's adjudication as an habitual substance offender. The trial court suspended one year of the sentence. Fitch now appeals.

Discussion and Decision

I. Right to a Public Trial – Removal of Spectators

On appeal, Fitch argues that the trial court violated his rights under the Sixth Amendment to the Federal Constitution and Article I, Section 13 of the Indiana Constitution to a public trial by clearing the courtroom during the testimony of the confidential informant. The right to a public trial has long been recognized as a fundamental right of the accused. Williams v. State, 690 N.E.2d 162, 167 (Ind. 1997). That right, however, is not absolute. Id.

It "may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." Waller v. Georgia, 467 U.S. 39, 45 (1984). The standard for evaluating such questions was established in Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984). There, the U.S. Supreme Court determined that

> [t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Id. at 510. The Indiana Supreme Court has recognized that the Sixth Amendment does not prohibit the exclusion of the public from a criminal trial where the witness fears retaliation, especially where the courtroom is cleared only during the testimony of that witness.[5] Williams, 690 N.E.2d at 167 (citing Hackett v. State, 266 Ind. 103, 360 N.E.2d 1000 (1977)). In Hackett, our Supreme Court held that the defendant's Sixth Amendment right to a public trial had not been violated where the trial court removed the public from the courtroom during the testimony of one witness. That witness had expressed repeatedly her fear of testifying in front of the defendant's family and friends. Hackett, 360 N.E.2d at 1004.

Citing Kendrick v. State, 661 N.E.2d 1242, 1244 (Ind. Ct. App. 1996), Fitch requests that, at a minimum, this Court remand for the trial court to make specific findings supporting its closure of the courtroom. In Kendrick, the trial court originally made no specific findings,

[5] While Fitch has cited provisions of both the Federal and the Indiana Constitutions in his argument, neither he nor our Supreme Court has suggested that the Indiana Constitution establishes a right different from that found in the Sixth Amendment. See Appellant's Brief at 5; Williams v. State, 690 N.E.2d 162, 167 (Ind. 1997).

simply stating that it "had read the law." Id. On appeal after remand, this Court affirmed the convictions, relying first on the finding that the defendant had a history of violence and second, the exclusion from the courtroom of only two of the defendant's friends during the testimony of one witness. Kendrick v. State, 670 N.E.2d 369, 370-71 (Ind. Ct. App. 1996), trans. denied. Contrary to Fitch's assertion, we conclude that the trial court made a record specific enough for our review, by stating that "this is a confidential informant whose safety is at stake" and that the witness should "be allowed to testify not under the threat of duress or fear." Tr. at 470.

Here, the State sought to protect a confidential informant who had been working on such dangerous assignments for five years. His very identity was sensitive. As with our Supreme Court's decision in Hackett, we conclude that the closing of the courtroom during the confidential informant's testimony was narrowly tailored and essential for ensuring the safety of the government's witness. The trial court did not err in removing spectators from the courtroom during his testimony.

II. Prosecutorial Misconduct

Fitch argues that the State committed prosecutorial misconduct in referring repeatedly in its closing argument to facts not in evidence. He acknowledges, however, that, while he objected contemporaneously, he waived the issue by not requesting an admonishment or mistrial. Consequentially, Fitch concedes that he must establish on appeal that the prosecutorial misconduct amounted to fundamental error. Appellant's Brief at 9. "For prosecutorial misconduct to constitute fundamental error, it must 'make a fair trial impossible

or constitute clearly blatant violations of basic and elementary principles of due process [and] present an undeniable and substantial potential for harm.'" Booher v. State, 773 N.E.2d 814, 817 (Ind. 2002) (quoting Benson v. State, 762 N.E.2d 748, 756 (Ind. 2002)).

We agree that the State argued facts not established by the evidence offered. Furthermore, the State repeated itself even after the trial court had sustained Fitch's first objection. The statements, however, did not rise to the level of fundamental error. It was clear from the State's argument that it was referring to what can happen potentially when such a nuisance exists. One could not have reasonably inferred that the State was accusing Fitch of the type of acts it had mentioned. Indeed, it was clear that the State was noting the potential actions of addicts or what a drug dealer could do. The State alleged and proved, by offering the testimony of a witness who participated in the transactions, that Fitch dealt cocaine on three different occasions. While the statements made in the State's closing argument were not relevant to the charges, they did not make a fair trial impossible or present an undeniable and substantial potential for harm.

III. Habitual Substance Offender Adjudication – Waiver of Right to Trial by Jury

After the jury delivered its verdicts, the trial court referenced prior discussions that Fitch would waive his right to trial by jury for purposes of the habitual substance offender adjudication. Counsel for Fitch and the State confirmed those discussions. Fitch, however, made no statement on this issue. Fitch argues and the State now acknowledges that the trial court violated Fitch's Sixth Amendment right to trial by jury by conducting the habitual substance offender adjudication without a jury, where Fitch did not personally waive that

right. See Kellems v. State, 849 N.E.2d 1110, 1113-14 (Ind. 2006) (ordering a new trial where the defendant did not state personally on the record that he waived his right to trial by jury); Ind. Code § 35-50-2-10(d) (requiring jury to convene for adjudication phase if the substance offense was tried to a jury). Accordingly, we vacate the adjudication of Fitch as an habitual substance offender and remand the matter for further proceedings regarding the allegation.

IV. Sentencing

The trial court imposed concurrent, eighteen-year sentences of imprisonment for the three counts of dealing in cocaine, and imposed a separate sentence for Fitch's adjudication as an habitual substance offender. Both Fitch and the State correctly cite Reffett v. State for the proposition that the imposition of a separate sentence for an adjudication as an habitual substance offender constitutes error. Reffett v. State, 844 N.E.2d 1072, 1074 (Ind. Ct. App. 2006). The parties agree, as do we, that if, on remand, Fitch is adjudicated an habitual substance offender, the sentence should not be imposed as a separate sentence. See I.C. § 35-50-2-10(f). Instead, the trial court should enhance the sentence of one, not all, of the convictions of dealing in cocaine. See Winn v. State, 748 N.E.2d 352, 360 (Ind. 2001) (citing Greer v. State, 680 N.E.2d 526, 527 (Ind. 1997) ("In the event of simultaneous multiple felony convictions and a finding of habitual offender status, trial courts must impose the resulting penalty enhancement upon only one of the convictions and must specify the conviction to be so enhanced.")).

Conclusion

We affirm Fitch's convictions for three counts of dealing in cocaine. For the reasons noted above, we vacate the adjudication of Fitch as an habitual substance offender and remand for further proceedings with respect to this allegation.[6]

SHARPNACK, J., and MAY, J., concur.

[6] Note also that any portion of a sentence enhanced by virtue of an adjudication as an habitual substance offender may not be suspended. Reffett v. State, 844 N.E.2d 1072, 1074 (Ind. Ct. App. 2006).